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JUN 27 1962
JOHN F. DAVIS, CLERK

No. 215

Before

Supreme Court of the United States

October Term, [redacted]

HOWARD R. WARD,
Plaintiff-Appellee,

vs.

NORTHERN OHIO TELEPHONE COMPANY,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported in 300 F 2d 816 (May 21, 1962 Adv. Sheets), and a copy is attached as Appendix pages 32-40.

JURISDICTION

The date of the order sought to be reviewed is April 3, 1962, and the order was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit on April 3, 1962.

The statutory provision which appellant contends confers on the United States Supreme Court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, Section 1254, USCA, which provides that:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

QUESTIONS PRESENTED

The questions presented for review are as follows:

Did the Court of Appeals for the Sixth Circuit commit error when it reversed the District Court, which had in turn dismissed plaintiff's petition for the reason that the Court lacked jurisdiction over the subject matter of the claims set forth therein, when:

1. The Court of Appeals ignored the fact that the Supreme Court of the United States has repeatedly held that the doctrine of primary jurisdiction of an administrative agency applies whenever enforcement of a claim requires the resolution of issues which have been placed within the special competence of that administrative agency.

2. The Court of Appeals ignored the fact that the Federal Communications Commission had made an administrative interpretation that defendant-appellant was a "connecting carrier" and, as such, was not subject to the Act except for certain limited purposes.

3. The Court of Appeals ignored the plain provisions of the Federal Communications Act of 1934 which provide that a "connecting carrier" is not subject to Sections 206-207 of the Act.

STATUTES INVOLVED

The statutes involved are Title 28, U. S. Code, Section 1337; the Federal Communications Act of 1934 (Title 47, U. S. Code, Sections 151 et seq.), i.e. Section 152, Section 153 (h) & (u), Sections 201, 202, 203, 205, 206 and 207 (the pertinent text of these statutes is set forth in the appendix, pages 27-31).

STATEMENT OF THE CASE

Plaintiff-appellee, Howard R. Ward, was the operator of a radio station located in Bowling Green, Wood County, Ohio, which radio station was duly licensed by the Federal Communications Commission. (page 46)

Defendant-appellant is a telephone company engaged in operating an intrastate telephone business solely within the State of Ohio a. l is and was subject to the jurisdiction of The Public Utilities Commission of Ohio with approved schedules of rates and charges on file with said The Public Utilities Commission of Ohio (page 41); all of the physical properties, lines, exchanges, telephone lines and toll lines owned, maintained or operated by it are entirely within the State of Ohio; the only connection it has with interstate commerce or communication is solely as a "connecting carrier" (as defined in Title 47, U. S. Code, Section 153 (u) of the Federal Communications Act of 1934) through physical connection with the facilities of other telephone companies and that none of said other companies, either directly or indirectly, controls said Northern Ohio Telephone Company, or is controlled by said Northern Ohio Telephone Company, and there is no direct or indirect common control between any of said other companies and said Northern Ohio Telephone Company, either by virtue of the existence of any interlocking directorates or stock ownership control or otherwise. (pages 41-42).

The Northern Ohio Telephone Company is and has been deemed a non-subject company under the Communications Act of 1934 by the Federal Communications Commission. (pages 42-44)

Plaintiff-appellee alleges in his petition that, during the period from 1954 to 1959, defendant-appellant wrongfully failed to furnish him necessary telephone lines on various occasions to carry radio broadcasts from the source of the

program to the transmitter for broadcast and, in addition, for those lines furnished for broadcast purposes charged rates not on file with the Federal Communications Commission as required by the provisions of the Federal Communications Act. Eight (8) separate causes of action are set forth in the petition. (pages 46-53)

Defendant-appellant's motion to dismiss the petition on the ground that the Court lacked jurisdiction was granted by the District Court. (page 53)

Plaintiff-appellee appealed to the United States Court of Appeals for the Sixth Circuit which set aside the order of dismissal on the basis that the District Court had jurisdiction over the subject matter of the claims set forth in the petition and remanded the case to the District Court for a hearing on the merits. (pages 32-40)

BASIS OF JURISDICTION

It is defendant-appellant's contention that there was no basis for the United States District Court to assume jurisdiction inasmuch as there was no diversity of citizenship between the plaintiff and the defendant, and if the case is brought as involving a federal question under the Federal Communications Act of 1934, that there was no basis for jurisdiction under the provisions of the Act; or assuming that the United States District Court did have jurisdiction under the Act as involving a federal question (which appellant denies) then the primary jurisdiction of the Federal Communications Commission should have been first invoked to decide the administrative question as to whether defendant-appellant was subject to the provisions of the Act; and, further, that the administrative question having already been decided by the Federal Communications Commission, the United States District Court should not reverse an administrative determination which is of long standing and has been relied upon by defendant-appellant.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Defendant-appellant believes that the Writ of Certiorari should be granted because the Court of Appeals for the Sixth Circuit has rendered a decision in direct conflict with applicable decisions of this Court involving the primary jurisdiction of an administrative agency (the Federal Communications Commission) under the Federal Communications Act of 1934, and because the Court of Appeals has, in effect, reversed an administrative interpretation of many years' standing on a matter involving enforcement of the Act which is peculiarly within the competence of the Federal Communications Commission and upon which defendant-appellant has long relied.

I

THE DOCTRINE OF PRIMARY JURISDICTION

The Doctrine of Primary Jurisdiction was early adopted by this Court in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, 51 L ed 553, 27 S Ct. Rep. 350, in an opinion by Chief Justice White. At page 442 it was stated:

> "* * * In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. * * *"

The matter of a Federal District Court attempting to determine matters properly vested in an administrative body was later discussed in the case of *Procter & Gamble*

Company v. United States, 225 U S 282, 56 L Ed 1091, 32 S. Ct. 754, at page 294, when this Court stated:

> "* * * to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the court below of the power which it deemed it possessed, would result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action were contemplated. It cannot be disputed that the act creating the commerce court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission) upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That, in adopting the provision concerning the commerce court, and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce, is certain. The act creating the commerce court was entitled, 'An Act to Create a Commerce Court, and to Amend the Act Entitled, 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen Hundred and Eighty-seven, as Heretofore Amended, and for Other Purposes.' The first six sections, which called into being the commerce court and defined its powers, all demonstrate the purpose as above stated; that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation

provided by the act to regulate commerce as it then existed.

"What was then the existing system and the functions which the new court was created to perform will be conclusively shown by a brief outline of the scope and purpose of the system which arose from the enactment of the act to regulate commerce (act February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. Supp. 1911, p. 1284) and its development. By that act, as originally enacted, many regulations and consequent duties were impósed upon carriers in the interest of the public and of shippers which did not theretofore exist, and various administrative safeguards were formulated, all of which, in their very essence, required, first, for their compulsory enforcement, the exercise of official functions of an administrative nature; and, second, for their harmonious development, an official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the act (§ 11) created an administrative body endowed with what may be in some respects qualified as *quasi* judicial attributes, to whom was confided the enforcement of those provisions of the act which essentially exacted unity in order that they might beneficially operate. *And for the purposes stated, to the body thus created was committed the trust of enforcing the act in the respect stated, of determining,* limited as to the subject-matters to which we have referred, *whether the provisions of the act had been violated, and if so, of primarily enforcing the act by awarding appropriate relief.* The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt, coming within the scope of the administrative unity which we have mentioned, primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. *In other words, as to the subjects stated, the act did not give to the courts power to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints when, by previous submission*

to the Commission, they had been sanctioned by a command of that body.

"In the long interval which intervened between 1887, when the act to regulate commerce was enacted, and June 18, 1910, when the commerce court act was passed, *we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act* to regulate commerce by dealing directly with the subject, irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of, or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that *it was never considered that there was power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act.* The subject is illustrated and made clear by the rulings in *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, ante, 863, 32 Sup. Ct. Rep. 535; *Robinson v. Baltimore & O. R. Co.* 222 U. S. 506, ante, 288, 32 Sup. Ct. Rep. 114; *Southern R. Co. v. Reid*, 222 U. S. 424, ante, 257, 32 Sup. Ct. Rep. 140, and *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075. The latter case especially will serve to point out that where the power of original action by a court, without previous action of the Commission, was insisted upon, it was based upon the conception that the particular subject-matter as to which such power was asserted was, by the express terms of the act to regulate commerce, not embraced within the subjects primarily confided by the act exclusively to the administrative authority of the Commission." (Emphasis ours)

The portion of the opinion in the *Procter & Gamble* case (supra) relating to the doctrine of "negative orders" was officially abandoned by the Supreme Court in the case of *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 83 L ed 1147, 59 S Ct 754, but the doctrine of primary jurisdiction was affirmed. In this case Mr. Justice Frankfurter stated, at page 137:

> "The impelling consideration underlying the decision in the Procter & G. Co. Case did not concern technical procedure. It was part of the process of adjusting relations between the Interstate Commerce Commission and the courts to effectuate the purposes of the Commission. This is made abundantly clear by the general atmosphere of the opinion as well as by its language, particularly when regard is had to the fact that the Court's spokesman was Chief Justice White, who had such a large share in developing modern administrative law." (At this point the Court referred to part of the above quotation from the Procter & Gamble case in a footnote.)

In the same case of *Rochester Telephone Corp.*, the Court went on to point out, at page 139:

> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. * * *"

We believe it significant that in the case of *Rochester Telephone Corp.* (supra) that the Supreme Court discussed the cases dealing with the Interstate Commerce Commission in reaching a decision under the Federal Communications Act. The reason for this is that the Federal Com-

munications Act was closely patterned after the Interstate Commerce Act and decisions under the latter act would be applicable to matters involving primary jurisdiction of an administrative agency.

As stated in the case of *Armour & Co. v. Alton R. Co.*, 312 U S 195, 85 L. Ed. 771, 61 S. Ct. 498, at page 202, the Supreme Court held:

> "The principles making up the so-called primary jurisdiction doctrine are well settled. * * *"

In the case of *United States v. Interstate Commerce Commission*, 337 U S 426, 93 L ed 1451, 69 S Ct 1410, at page 437 the Supreme Court of the United States held:

> "* * * But it has been established doctrine since this Court's holding in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U S 426, 51 L ed 553, 27 S Ct 350, 9 Ann. Cas. 1075, that a shipper cannot file a §9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for exercise of the Commission's primary jurisdiction. * * *"

A "Section 9 proceeding" is comparable to the Section 207 proceeding which was attempted by Plaintiff-Appellee in this case.

In the footnote thereto there was cited the *Rochester Telephone Corp. v. United States*, 307 U S 125, 83 L. Ed. 1147, 59 S Ct 754; *Armour & Co. v. Alton R. Co.*, 312 U S 195, 85 L. Ed. 771, 61 S Ct 498; and *Skinner & E. Corp. v. United States*, 249 U S 557, 63 L. Ed. 772, 39 S Ct 375.

In the case of *United States v. Western P. R. Co.*, 352 U S 59, 1 L ed 2d 126, 77 S. Ct. 161; the Court stated at page 63:

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged

with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." General American Tank Car Corp. v. El Dorado Terminal Co. 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325.

"No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co. 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See Far East Conference v. United States, 342 U S 570, 96 L ed 576, 72 S Ct 492. The two factors are part of the same principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for

ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' Id. 342 US at 574, 575.

"The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural timetable of the lawsuit. It is a doctrine allocating the law-making power over certain aspects' of commercial relations. 'It transfers from court to agency the power to determine' some of the incidents of such relations.

"Thus the first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act. Decision is governed by two earlier cases in this Court. In Texas & Pacific R. Co. v American Tie & Timber Co. 234 US 138, 58 L ed 1255, 34 S Ct 885, a shipper attempted to ship oak railroad ties under a tariff for 'lumber.' The carrier rejected them, urging that such ties were not lumber. In a damage action expert testimoney was received on the question. This Court, however, held that the Interstate Commerce Commission alone could resolve the question. The effect of the holding is clear: the courts must not only refrain from making tariffs; but, under certain circumstances, must decline to construe them as well. A particularization of such circumstances emerged in Great Northern R. Co. v Merchants Elevator Co. 259 US 285, 66 L ed 943, 42 S Ct 477. There the Court held that where the question is simply one of construction the courts may pass on it as an issue 'solely of law.' But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff-application must first go to the Commission. The reason is plainly

> set forth: such a determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.' Id. 259 US at 291. * * *"

In the more recent case of *Pennsylvania R. Co. v. United States*, 363 U S 202, 4 L ed 2d 1165, 80 S Ct 1131, the Supreme Court of the United States approved the action of the Court of Claims in suspending proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of rates, but disapproved of the Court of Claims not further suspending proceedings until the validity of the order of the Interstate Commerce Commission could be tested in a Federal District Court.

In the very recent case of *California v. Federal Power Commission* (decision of April 30, 1962), ... U.S. ..., 8 L ed 2d 54, the Supreme Court of the United States held at page 60:

> "* * * Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co. v. Abilene Oil Co.*, 204 U S 426. * * *"

It is, thus, apparent that for over fifty years this Court has followed the rule that primary jurisdiction of an administrative agency must be pursued before resort to the Federal District Courts can be had. Since in this instance no application was made by plaintiff to the Federal Communications Commission for a determination that defendant was a common carrier subject to the Act, the Federal District Court could not exercise or assume jurisdiction of such an administrative matter.

These same principles have been almost universally followed by the Circuit Courts of Appeals, as illustrated by the following cases:

In *McIntire et al. v. Wm. Penn Broadcasting Co. of Philadelphia*, 151 F 2d 597, (3 CCA 1945) it was stated:

> "7. Enforcement of Communications Act rests in Communications Commission and not in Federal District Courts, except for statutory review of Commission's orders."

In this case, a dismissal by the Federal District Court was affirmed by the Circuit Court of Appeals.

In the case of *Booth v. American Telephone and Telegraph Company*, (CCA-7) 253 F 2d 57, at page 58 the Court stated:

> "Title 47 USCA, Sec. 207, upon which the plaintiff relies, is almost identical with the first sentence of Title 49 USCA, Sec. 9. In construing the latter section the Supreme Court has clearly held that a shipper cannot file thereunder a proceeding in a district court where his claim for damages necessarily involves a question of reasonableness in rates calling for the exercise of the Commission's primary jurisdiction. (Citing Abilene case, 204 U S 426, and U. S. v. ICC, 337 U S 426.)"

The Federal District Courts have also been, of course, bound by the primary jurisdiction doctrine, as pointed out in *Slenger v. The Slenger Broadcasting Corporation*, 28 F. Supp. 407, at page 409:

> "* * * The Communications Act gives the Commission the sole authority to execute and enforce its provisions, and gives the Commission ample powers to do so. * * *
>
> "Under this section (47 USCA, Sec. 401(a)), the Commission is the proper forum before which to institute proceedings concerning alleged violations of the Act. * * *"

In *Nelson, et al. v. Leighton, et al.*, (USDC N.D. of N. Y.) 82 F. Supp. 661, at page 664, the District Court held:

> "The determination of the controversy may well be prefaced by a brief discussion of the statute involved.

> In the Communications Act of 1934 Congress has set up a complete scheme for the regulation of radio transmission in the public interest. That scheme involves the enforcement in the first instance by administrative action of the provisions of law and the regulations adopted in pursuance thereto. The Commission is the proper forum to institute and prosecute proceedings concerning alleged violations of the Act. 47 USCA, Sec. 151; *Stenger v. The Stenger Broadcasting Corporation*, D. C., 28 F supp. 407 * * *.
>
> "* * * Plaintiffs do not in any way seek in this action to interfere with the ownership or use of the broadcasting license. The Communications Act comes into the case only as an alleged incident of defendant's wrongdoing. Interpretation of the construction of a federal statute is necessary to establish jurisdiction. The application thereof is insufficient."

In *Theobald Industries v. Delaware, L. & W. R. Corp.*, 122 F supp. 235 (USDC New Jersey), at page 237 it was stated:

> "If this court were to render a decision on the merits of this case, we would, in effect, be establishing a tariff, which is the exclusive duty of the Interstate Commerce Commission."

It is submitted that the above cases are conclusive, that the Federal District Court did not have jurisdiction to determine whether defendant-appellant was under the jurisdiction of the Federal Communications Commission, or subject to the provisions of the Federal Communications Act. It must be remembered that the "First Cause of Action" in plaintiff-appellee's petition alleged that he was charged for wire and telephone service to his radio station according to tariffs on file with The Public Utilities Commission of Ohio, but that such tariffs were not on file with the Federal Communications Commission as required by the Federal Communications Act, and that, therefore, he was

charged unlawfully for such service by defendant-appellant. page 47)

The question raised in the first cause of action is whether it was necessary for defendant-appellant to file its tariffs with the Federal Communications Commission, setting rates and charges for service to a radio station. Certainly this is a matter within the administrative competence of the Federal Communications Commission and not within the conventional experience of judges of United States District Courts. This was a question which, of necessity, had to be submitted to the Federal Communications Commission before a Federal District Court could assume jurisdiction of the matter.

II

CONFLICT WITH ADMINISTRATIVE INTERPRETATION

The decision of the United States Court of Appeals for the Sixth Circuit is in direct conflict with an administrative interpretation made by the Federal Communications Commission over twenty-five years ago and is in direct conflict with decisions of the Federal Communications Commission under the Communications Act of 1934.

Shortly after the passage of the Communications Act of 1934, hearings were held by the Federal Communications Commission entitled "*In the Matter of Classification of Telephone Companies*", (Section 2(b)(2)), Docket No. 2809, submitted March 25, 1935; decided December 18, 1935; and reported in 3 FCC 37. Among the appearances noted of the various telephone companies and associations was one Frank A. Knapp on behalf of Ohio Independent Telephone Assn. Mr. Knapp, at that time, was president of Northern Ohio Telephone Company, defendant-appellant.

At page 38 of said report is the following quote:

"Many telephone carriers claiming exemption from the jurisdiction of the Commission, except as to Sections 201-205 of the Communications Act of 1934, requested of the Commission an opportunity to present arguments in support of their construction of Section 2 (b) (2) of the Communications Act; and the Commission placed this matter on the docket 'for the purpose of hearing arguments by such telephone companies claiming exemption under 2 (b) (2) of the Act and any State regulatory commission desiring to be heard'. Briefs were filed and oral arguments were heard on behalf of all parties requesting to be heard."

After quoting Section 2 of the Communications Act, and Section 3 (n) of the Act, the report went on to state:

"It will be seen that Section 2 (b) (2) exempts from the jurisdiction of the Commission, except as to Sections 201-205, inclusive, carriers engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier.

"The Commission having heard and having considered all facts and matters presented for and on behalf of telephone carriers, and having read and having considered the law, and being fully advised, finds and holds that:

"1. Every wire telephone carrier owning, maintaining, or operating a toll line which crosses a state or national boundary is subject to all the provisions of the Communications Act of 1934.

"2. A wire telephone carrier which neither demands nor receives any charge, compensation, or commission on interstate communication or service is not subject to the Act.

"3. Every wire telephone carrier with one or more exchanges, or one or more toll lines within a single state, participating in interstate communication by physical connection with another wire telephone carrier within the same state, is subject to Sections 201

to 205 only of the Act, except when the matter of control referred to in Section 2 (b) (2) of the Act is involved.

"4. The phrase 'directly or indirectly controlling or controlled by, or under direct or indirect common control with' as used in Section 2 (b) (2) of the Act contemplates a mixed question of fact and law to be determined in each case heard and considered by the Commission."

Defendant-appellant desires to emphasize, in paragraph 3, the words "subject to Sections 201 to 205 *only* of the Act".

That this interpretation was made as to defendant-appellant Northern Ohio Telephone Company is evidenced by the letter of April 18, 1958, from the Federal Communications Commission to Northern Ohio Telephone Company, which requests a copy of an annual report and states, "supplying a copy of this annual report on a voluntary basis would not prejudice your status as a non-subject company under the Communications Act." (Exhibit A of appendix, pages 43 and 44)

The decisions of the Federal Communications Commission are unanimous to the effect that a telephone company which furnishes wires to a broadcasting company does not lose its status as a connecting carrier and that it continues to be a non-subject company under the Act.

Thus, in the case of *Jamestown Telephone Corporation*, 4 FCC 326, at page 341 the Commission held:

> "The respondent leases wires to a broadcasting company for broadcast purposes but the furnishing of these facilities is deemed not such as to affect the question of control in this case."

The Commission then found that the company was "a connecting carrier as contemplated by Section 2 (b) (2) of the Communications Act of 1934."

In the matter of *Northwest Telephone Company*, 6 FCC 138, at page 140 the Commission held:

> "The evidence shows that at the time of the hearing the North-West Company furnished to Station WIBU at Poynette, Wisconsin, a pair of wires which are used for broadcasting purposes.
>
> "Although this Commission has exclusive regulatory jurisdiction over wires and wire service furnished by a telephone carrier to a broadcasting station even though such wires are wholly within the confines of a single state, the furnishing of such service does not change the status of a carrier which might otherwise be classified as a connecting carrier. We so held in Capital City Telephone Company, 3 FCC Reports 189. Therefore, the furnishing of such facilities is not material herein."

That defendant-appellant Northern Ohio Telephone Company has relied upon this administrative construction of the Federal Communications Act of 1934 is additional reason for not reversing such an administrative construction.

As stated in the case of *United States v. Chicago, N.S. and M.R. Co.* 288 U.S. 1, 77 L.ed 583, 53 S. Ct. 245, the Supreme Court of the United States, after noting that the Interstate Commerce Commission had had a uniform administrative construction of a section of the Interstate Commerce Act for many years, stated at page 13:

> "* * * Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. (Citing cases)
>
> "The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under §20a for the issuance of securities. Evidently entertaining serious doubts on this question, it has, for more than a decade, resolved them in favor of the carrier, and the company and its officers have acted in reliance on the

> administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation."

Although we do not believe that the Federal Communications Act of 1934 is of doubtful meaning, and believe that it clearly exempts defendant-appellant as a connecting carrier, if the statute could be considered of doubtful meaning, administrative practice should be persuasive. In the case of *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 84 L ed 20, 60 S. Ct. 51, at page 52, the Supreme Court of the United States held:

> "Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it."

The fact that this administrative interpretation was made by the original members of the Federal Communications Commission who had responsibility for setting up the machinery to enforce the Act, and that such interpretation has lasted over twenty-five years, is also persuasive that the interpretation was and still is correct.

This principle has recently been affirmed in the case of *Power Reactor Develop. Co. v. Electrical Union*, 367 U. S. 396, 6 L ed 2d 924, 81 Sup Ct 1529, at page 408, where the Supreme Court of the United States held:

"* * * We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision. Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315, 77 L ed 796, 807, 53 Sup Ct. 350 (1933). * * *"

It is evident that defendant-appellant has on file with the Public Utilities Commission of Ohio approved schedules of rates and regulations. (Appendix page 41) That such schedules have not similarly been filed with the Federal Communications Commission has been in accord with the administrative interpretation of many years' standing and relied upon by defendant-appellant.

Such an administrative interpretation, which has been relied upon by such a telephone company as defendant-appellant and which would affect defendant-appellant, should not be overturned except for very cogent reasons. There are no such cogent reasons existing in this case.

III

COMMUNICATIONS ACT DOES NOT AUTHORIZE AN ACTION AGAINST A CONNECTING CARRIER

The Federal Communications Act of 1934 does not authorize an action for damages in the United States District Court against a "connecting carrier", as defined in the Act, for failing to file a schedule of charges or tariffs with the Federal Communications Commission or for refusing to furnish telephone lines to a radio station.

The United States Court of Appeals for the Sixth Circuit held, at page 818 (300 F 2d 818):

> "It is conceded by appellee-company that it is subject to the provisions of Title 47, USCA, Sections 219, 220, inclusive, to the extent that it is required to account to, and render certain requested reports to, the Federal Communications Commission."

Not only was such a concession never made by defendant-appellant herein, but Exhibit A (Appendix pages 43 and 44) is further evidence that such reports have not been filed by the company except as an act of courtesy in response to that letter which stated:

> "Supplying a copy of this annual report on a voluntary basis would not prejudice your status as a non-subject company under the Communications Act."

All Federal Courts other than the Supreme Court are courts of special or limited jurisdiction, as defined by Acts of Congress. *Lockerty vs. Phillips*, 319 U S 182, 87 L ed 1339, 63 S. Ct. 1019.

> "* * * Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. * * *" *Healy vs. Ratta*, 292 U. S. 263 at 270, 78 L. ed. 1248 at 1254, 54 S. Ct. 700.
>
> "The accepted doctrine is that the lower Federal Courts were created by the Acts of Congress and their powers and duties depend upon the acts which called them into existence, or subsequent ones which extend or limit. * * *" *Gillis v. California*, 293 U. S. 62 at page 66, 79 L. ed 199 at page 201, 55 S. Ct. 4.

Unless the Federal District Court has been granted jurisdiction by a particular Act of Congress, then the Court did not have jurisdiction in the instant case.

This action was brought in the United States District Court upon the claimed authority of Sections 206 and 207

of title 47, U. S. Code, authorizing suit against "common carriers subject to the provisions of this chapter."

Defendant-appellee is not a common carrier and is subject to the act only for limited purposes not here relevant. By specific provision of Section 152 (b) of the Act, Sections 206 and 207 do not apply to defendant-appellee, an intrastate company.

Section 206 refers only to *common carriers* which, by definition of Section 152, do not include connecting carriers. Section 206 provides, in part, as follows:

> "In case any *common carrier* shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such *common carrier* shall be liable to the person or persons injured * * *" (Emphasis ours).

Section 207 provides as follows:

> "Any person claiming to be damaged by *any common carrier subject to the provisions of this chapter* may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." (Emphasis ours.)

It must be remembered that a common carrier is defined in Section 153 (h) and that a connecting carrier is defined in Section 153 (u), which, in turn, refers the definition of "connecting carrier" to Section 152 (b), Clauses (2), (3) or (4).

It is obvious that the defendant-appellee is a connecting carrier as described in Section 152 (b)(2). It is further apparent that the defendant-appellee, Northern Ohio Telephone Company, is not a "common carrier" as defined in

Section 153 (h) because it is not engaged in interstate or foreign communication.

Section 152(b) states, in part:

> "Subject to the provisions of Section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to * * * (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier * * * except that Sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in Clauses (2), (3) and (4)."

Section 201 of the Act states, in effect, that it is the duty of every "common carrier" engaged in interstate or foreign communication by wire or radio to do certain things.

Section 202 provides that it is unlawful for any "common carrier" to make any unjust or unreasonable discrimination in charges.

Section 203 provides, in effect, that every "common carrier except connecting carriers" shall file with the Commission its rates and charges.

Section 204 relates merely to the filing of new rates, classifications, regulations and charges.

Section 205 provides that the Commission is authorized to prescribe just and reasonable charges.

The Court of appeals for the Sixth Circuit cited the case *In Re Capitol City Telephone Company*, 3 FCC Reports, 189, as holding that the Federal Communications Commission has exclusive regulatory jurisdiction over wires and wire service furnished by a telephone carrier to a radio station, even though such wires do not cross state or national boundaries. The Court of Appeals ignored the holding, at page 192:

> "The Commission further finds that, although this Commission has exclusive regulatory jurisdiction over wires and wire services furnished by a telephone carrier to a radio station, the furnishing of such services does not change the status of a carrier which would otherwise be classified as a connecting carrier."

The interpretation of the Federal Communications Act of 1934, which was adopted as early as December 18, 1935, by the Federal Communications Commission "In the Matter of Classification of Telephone Companies", 3 FCC 37, was as follows:

> "3. Every wire telephone carrier with one or more exchanges, or one or more toll lines within a single state, participating in interstate communication by physical connection with another wire telephone carrier within the same state, is subject to Sections 201 to 205 *only* of the Act, except when the matter of control referred to in Section 2(b) (2) of the Act is involved." (Emphasis ours.)

It is apparent that the Federal Communications Commission has ruled that a "connecting carrier" is not subject to Sections 206 and 207 of the Act, under which plaintiff-appellee herein attempted to bring suit in the United States District Court.

Since plaintiff-appellee does not claim, nor can he claim, any diversity of citizenship, the jurisdiction of the District Court must have been dependent upon Section 1337, as involving an Act of Congress regulating commerce. Since the Federal Communications Act, in Sections 206 and 207, specifically applies only to "common carriers" there was no basis for jurisdiction in the Federal District Court in an action against a "connecting carrier".

CONCLUSION

It is defendant-appellant's belief that the United States District Court properly dismissed plaintiff's petition on the basis of the lack of jurisdiction over the subject matter of the claims set forth therein inasmuch as there is no diversity of citizenship between plaintiff-appellee and defendant-appellant, that there is no federal question under the Federal Communications Act of 1934 inasmuch as defendant-appellant is a "connecting carrier" to which Sections 206 and 207 of the Act are not applicable, that even if the foregoing were not true that primary jurisdiction of the Federal Communications Commission would have to be invoked to decide the administrative question as to whether defendant-appellant is or is not subject to the provisions of the Act which authorizes suits only against "common carriers", not "connecting carriers", and that the administrative interpretation that defendant- appellant is not subject to the Act has already been made by the Federal Communications Commission, which interpretation has been relied upon by defendant-appellant since 1935 and that such an administrative interpretation of many years' standing should not be overturned by this Court where no cogent reason has been presented for doing so.

The decision of the United States Court of Appeals for the Sixth Circuit, which reversed the action of the United States District Court dismissing the suit for lack of jurisdiction, should be reversed and the action of the United States District Court should be affirmed.

Respectfully submitted,

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APPENDIX

28 USCA, Section 1337

"*Commerce and antitrust regulations.*—The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

47 USCA, Section 152

"*Application.*—(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Philippine Islands or the Canal Zone, or to wire or radio communication or transmission wholly within the Philippine Islands or the Canal Zone.

"(b) Subject to the provisions of section 301 (301 this title), nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities; located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for

furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive (§§201-205 of this title), shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4)."

47 USCA, Section 153

"*Definitions.*—For the purposes of this Act, unless the context otherwise requires —

* * *

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * *

"(u) 'Connecting carrier' means a carrier described in clauses (2), (3), or (4) of section 2(b) (§152(b) of this title)."

47 USCA, Section 201

"*Service and charges.*—(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

"(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be un-

lawful; * * * The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

47 USCA, Section 202

"*Discrimination and preferences.*—(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

"(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of wires in chain broadcasting or incidental to radio communication of any kind.

"(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense."

47 USCA, Section 203

"*Schedules of charges—Filing with Commission—Changes in schedules—Overcharges and rebates—Penalty for violations.*—(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form,

and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

* * *

"(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense."

47 USCA, Section 205

"*Commission authorized to prescribe just and reasonable charges—Penalties for violations.*—(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any cha ge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

"(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or

agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense."

47 USCA, Section 206

"*Carriers' liability for damages.*—In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

47 USCA, Section 207

"*Recovery of damages.*—Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

No. 14569

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Appeal from the United States District Court for the Northern District of Ohio, Western Division.

HOWARD R. WARD,
Plaintiff-Appellant,

vs.

NORTHERN OHIO TELEPHONE COMPANY,
Defendant-Appellee.

Decided April 3, 1962.

Before: McAllister, Cecil, and Weick, Circuit Judges.

McAllister, Circuit Judge. Appellant Ward is the operator of a radio station duly licensed by the Federal Communications Commission. Appellee telephone company which formerly furnished telephone lines to him to carry radio broadcasts from the source of the program to the transmitter for broadcast, now refuses to continue that service, and claims that it is under no obligation to do so, since it is a company engaged only in intrastate telephone business within the State of Ohio, and subject only to the jurisdiction of the Public Utilities Commission of Ohio. Upon appellant's petition filed against appellee telephone company for damages for refusal to furnish such lines, the district court held that it had no jurisdiction over the subject matter of the claims set forth, and dismissed appellant's petition.

It is contended by appellant that appellee company unlawfully refused to furnish telephone lines to him in his capacity as operator of a radio station transmitting radio for broadcast purposes across state lines; that appellee company, although it has all of its telephone facilities located in only one state, is subject to damages for its refusal to furnish such telephone lines to him, under the provisions of federal statutes; that a federal question was presented to the district court by appellant's petition, setting forth such facts; and that the district court erred in dismissing his petition on the ground that it had no jurisdiction over the subject matter of the claims set forth therein.

Appellee telephone company contends that it is not doing business in interstate commerce as a common carrier engaged in interstate communication; that all of its facilities are located in one state and that it is therefore engaged only in intrastate communication; that it is only a connecting carrier, and, except for limited purposes of accounting and furnishing reports, not relevant in this case, it is not subject to the provisions of the Federal Communications Act which require a telephone company to furnish wire service to radio stations, under which Act appellant brought his suit; and that, in any event, it is specifically exempted from the provisions of the statute which require telephone companies to furnish such wire service.

Title 28, U.S.C.A., Section 1337 provides: "The District courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Title 47, U.S.C.A., Sections 201 et seq. provide for the furnishing of interstate and foreign communication by wire or radio, upon reasonable request; prohibits unjust and unreasonable discrimination and preferences; regulates

charges to be made for services; provides that such charges or services, whenever referred to in the Act, shall include those in connection with the use of wires in chain broadcasting or incidental to radio communication of any kind; sets forth the carrier's liability for damages for violation of the Act; and provides for actions to recover such damages.[1]

It is agreed that all of the facilities of appellee telephone company are located in the State of Ohio. Nevertheless, it is conceded by appellee company that it is subject to the provisions of Title 47, U.S.C.A., Sections 219-220, inclusive,

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[1] The relevant portions of Title 47, U.S.C.A. are as follows:

Section 201 provides:

"*Services and Charges*—(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor. . . ."

Section 202 provides:

"*Discrimination and preferences*—(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service. . . .

"(b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of wires in chain broadcasting or *incidental to radio communication of any kind*." (Emphasis supplied.)

Section 203 provides that every common carrier except connecting carriers must file rates and charges.

Section 204 relates to hearings on charges filed by common carriers.

Section 205 provides for hearings against carriers.

Section 206 provides:

"*Carriers liability for damages*—In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 207 provides:

"*Recovery of damages*—Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

to the extent that it is required to account to, and render certain requested reports to, the Federal Communications Commission.

Title 47, U.S.C.A., Sections 152 and 153, governing telephone companies engaged in interstate communication, and excepting certain companies from the application of its provisions, is also relevant in the light of certain contentions of appellee.[2]

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[2] Section 152 provides:

"*Application*—(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission transmission wholly within the Canal Zone.

"(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely though connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection."

Section 153 provides:

"*Definitions*—For the purposes of this chapter, unless the context otherwise requires—. . .

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. . . .

"(u). 'Connecting carrier' means a carrier described in clauses (2), (3), or (4) of Section 152(b) of this title. . . ."

In spite of a number of issues presented, and the complexities of relevant statutory provisions, there is a single controlling issue in this case; whether a telephone company, with all of its facilities located in one state, engaging only in intrastate telephone communication except for physical connections with carriers in other states, is subject to federal statutes requiring it to furnish telephone lines to radio stations broadcasting across state boundaries.

In the case of *In re: Capital City Telephone Company*, 3 F.C.C. Reports, 189, the Federal Communications Commission determined one of the main questions raised in this controversy. In that case, the Capital City Telephone Company was located entirely in the State of Missouri and leased its telephone lines to a radio station within the State of Missouri. In its decision, the Commission said:

> "Congress was cognizant of the fact that wires were used in connection with broadcasting. The intention of Congress to clothe the Federal Communications Commission with jurisdiction over charges and services for wires used in radio communication is evidenced by Section 202(b) which reads: 'Charges or services, whenever referred to in this Act, include charges for or services in connection with the use of wires in chain broadcasting or incidental to radio communication of any kind.'
>
> "The fact that the wires used to carry the program from the microphone to the transmitter may be confined to a single state does not mean that the wires are not used in interstate communication. The contract or leasing arrangement may be for a wire service which begins and ends within a single state. The complete transmission, however, is an interstate communication and is therefore subject to legislation by Congress under the commerce clause. . . .
>
> "In view of the express provisions of the Communications Act relative to the use of wires in connection with broadcasting, it is indisputable that Congress has

legislated on that question. It is a well established rule of constitutional interpretation that when Congress has legislated on a subject which is within its jurisdiction, such legislation is exclusive and the power therein granted by Congress is exclusive of all other powers.

. . .

"The interstate communication of a broadcasting company begins at the microphone, passes over the wires to the transmitter, and then through the ether, constituting a continuous interstate communication which, because of its very nature, must be subject to federal regulations. . . .

"This Commission has exclusive regulatory jurisdiction over wires and wire service furnished by a telephone carrier to a radio broadcasting station, even though such wires do not cross state or national boundaries." (Emphasis supplied.)

Where lines, therefore, are furnished for broadcast purposes to a radio station by a telephone company, the telephone company is engaged in interstate communication, and is in interstate commerce, subject to federal law, even where all the property of the company is located within a single state. "No state lines divide the radio waves, and national regulation is not only appropriate, but essential to the efficient use of radio facilities." *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Company*, 289 U. S. 266. Radio communication is interstate communication; and although all its facilities are located in one state, and although it is a connecting carrier, a telephone company, required to furnish lines to a radio station, on reasonable request, is considered a common carrier engaged in interstate communication. Such a common carrier, engaged in such interstate communication, is subject to the Federal Communications Act, including the sections providing for remedial action to be brought in the district court because of a violation of the Act. The conclusion

therefore follows that, under these statutes, appellee telephone company, insofar as the furnishing, or obligation to furnish, wires for broadcast purposes, is engaged in interstate commerce; and that it is under a duty to furnish such communication service by the use of wires to appellant either in chain broadcasting, or incidental to radio communication of any kind.

Appellee telephone company contends that it does not come under Title 47, U.S.C.A., Sections 206 and 207, heretofore referred to, which provide for the carrier's liability for damages and suit for recovery thereof, since it is not a "common carrier," subject to the provisions of this chapter, and that it is subject to the Act only for accounting and reporting services. Appellee further submits that the foregoing statutory sections do not apply to it, as it carries on only intrastate business.

In support of its contentions, appellee refers to the fact that Title 47, U.S.C.A., Section 153 (n) defines "common carrier" or "carrier" as any person engaged as a common carrier for hire in interstate or foreign communication by wire or radio, or in interstate or foreign radio transmitting of energy, except where reference is made to common carriers not subject to the Act; and that the statute defines "connecting carrier" as a carrier engaged in interstate communication only through physical connection with another carrier in an adjoining state.

It is claimed, by virtue of the foregoing, that appellee company is not a "common carrier" within the meaning of the Act, since it is not engaged in interstate commerce, but only in intrastate communication. It is submitted, rather, that, under the above statutes, appellee company is only a "connecting carrier" as distinguished from a "common carrier"; and that a connecting carrier not engaged in in-

terstate communication is not subject to the provisions of the federal statute requiring it to furnish wire communication service to a radio station. It is therefore contended that appellee, not being a common carrier engaged in interstate communication, is not subject to the provisions of the statute requiring a telephone company to furnish wire communication service to a radio station.

Appellee company argues that under Title 47, U.S.C.A., Section 152 (b), it is specifically excepted from the application of the statute. This contention stems from the following: the above provision of the statute sets forth that nothing in the Act shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, services, or facilities in connection with intrastate communication by wire or radio of any carrier, or (2) any carrier engaged in interstate communication solely through physical connection with the facilities of another carrier; or (3) any carrier engaged in interstate communication solely through physical connection by radio, or wire and radio, with facilities located in an adjoining state. It is, however, to be emphasized that at the conclusion of Section 152(b), it is provided that Sections 201-205 of the Act shall apply to carriers described in subsections (2) and (3).

When we examine the above-mentioned exception in the statute, we find that Sections 201-205 of the Act, relating to services, charges, unlawful discriminations, and preferences apply to any carrier, which is engaged in interstate communication solely through physical connection with the facilities of another carrier, or to any carrier, which is engaged in interstate communication solely through connection by radio, or by wire and radio, with facilities of another carrier located in an adjoining state.

Appellee telephone company is, therefore, not excepted from the jurisdiction of the Federal Communications Commission or from the statute giving a right of action for refusing to furnish wire service to a radio station.

It is our conclusion that appellee telephone company is subject to Title 47, U.S.C.A., Section 207, which provides, as heretofore stated, that an action can be brought in any district court of competent jurisdiction against common carriers engaged in interstate communication solely through physical connection, or connection by radio, or by wire and radio, with facilities of another carrier in an adjoining state, for failure to supply wire services, since such carriers, even though defined as connecting carriers, are subject to Sections 201-205 of Title 47, U.S.C.A.

All of the provisions of the Act, as well as the subject matter with which it is concerned, regarding the duties and liabilities of such a carrier as appellee telephone company, would be futile without the remedial provisions setting forth a right to damages for violation thereof and the method of enforcing such right. It would be unreasonable to hold that appellee company is subject to the duties and liabilities set forth in the statute but that it is not subject to the provisions for enforcement of the rights which the company may see fit to violate; and we see no reason to conclude that, while appellee company is subject to Sections 201-205, inclusive, of the Act, it is not subject to Sections 206-207, inclusive.

It is our conclusion, therefore, that the district court had jurisdiction over the subject matter of the claims set forth in the petition.

In accordance with the foregoing, the order of dismissal is set aside, and the case remanded for a hearing on the merits.

AFFIDAVIT OF WILLIAM C. HENRY IN SUPPORT OF MOTION OF DEFENDANT TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER.

(Filed February 2, 1961.)

State of Ohio,
County of Huron, ss.

William C. Henry, whose residence address is Norwalk, Ohio, being first duly sworn according to law, deposes and says:

1. That he is President and General Manager of Northern Ohio Telephone Company, defendant herein, and that he makes this affidavit in support of the motion of said defendant to dismiss this action for lack of jurisdiction over the subject matter.

2. That defendant, Northern Ohio Telephone Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, engaged in operating an intrastate telephone business wholly and solely within the State of Ohio with its principal office and place of business in Bellevue, Ohio;

3. That said Northern Ohio Telephone Company is and at all times referred to in plaintiff's petition in this cause was subject to the jurisdiction of the Public Utilities Commission of Ohio with approved schedules of rates and regulations on file with said Public Utilities Commission of Ohio;

4. That said Northern Ohio Telephone Company neither owns, maintains or operates exchanges, telephone lines or toll lines which cross a state or national boundary, nor does it own, maintain or operate any physical property outside the State of Ohio;

5. All of the physical properties, lines, exchanges and toll lines owned, maintained or operated by said Northern Ohio Telephone Company are confined to a single state, to wit, the State of Ohio;

6. That said Northern Ohio Telephone Company is, and was at all times mentioned in plaintiff's petition in this cause, deemed and considered by the Federal Communications Commission as a "non-subject" company under the Federal Communications Act of 1934, as evidenced by a letter dated April 18, 1958, from the Federal Communications Commission to said Northern Ohio Telephone Company, which letter was received by affiant, a copy of which is incorporated herein by reference and attached hereto and identified as "Exhibit A";

7. That the only connection said Northern Ohio Telephone Company has with interstate commerce or communication is wholly and solely as a "connecting carrier" (as defined in title 47 U. S. C. A., Section 153 (u) of the Federal Communications Act of 1934) through physical connection with the facilities of other telephone companies; and that none of said other companies either directly or indirectly controls said Northern Ohio Telephone Company; or is controlled by said Northern Ohio Telephone Company; moreover, there is no direct or indirect common control between any of said other companies and said Northern Ohio Telephone Company either by virtue of the existence of any interlocking directorates or stock ownership control or otherwise, but that on the contrary said Northern Ohio Telephone Company is completely an independently owned and operated company.

Further affiant saith not.

(s) William C. Henby.
(s) Wm. C. Henby.

(Jurat omitted.)

EXHIBIT A.

Letter, April 18, 1958, Federal Communications Commission to Northern Ohio Telephone Company.

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.
April 18, 1958

In Reply Refer to:
9160

Northern Ohio Telephone Company
Bellevue
Ohio

Gentlemen:

You are no doubt acquainted with the Commission's annual "yearbook" publication, "Statistics of the Communications Industry in the United States." We have been publishing in this yearbook data by individual company only for telephone companies required by the Communications Act and the Commission's Rules to file Form M Annual Reports. We receive Form M Annual Reports from a few non-subject telephone companies but have not been publishing any data from these reports.

It has been suggested that our yearbook would be more useful to many persons who have occasion to refer to it if there were added a section listing data, by company, for the larger telephone companies not required to report to the Commission. Your company is one of the larger independents and this makes it most desirable for it to be included in any such new section of our yearbook. We would need access to a copy of your annual report filed with the Ohio Public Utilities Commission which we understand is similar to our Annual Report Form M. Supplying

a copy of this annual report on a voluntary basis would not prejudice your status as a non-subject company under the Communications Act. We are seeking the same voluntary filings by all other non-subject telephone companies in the United States having in excess of 100,000 telephones in service. If we are able to add these companies, it will approximately double our yearbook statistical coverage of the independent telephone industry.

If you are willing to help us with this project, we would like a copy of your report for 1957 and, of course, for future years. We realize that your 1957 report has already been prepared and that you may not have an extra copy. In this event, if you could send us your office file copy, we would take off the figures required and return it to you promptly.

Your sympathetic consideration of this request will be sincerely appreciated.

Very truly yours,
MARY JANE MORRIS
Secretary

No. 8553.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Ohio,
Western Division.

HOWARD R. WARD,
Plaintiff,

vs.

NORTHERN OHIO TELEPHONE COMPANY,
Defendant.

TRANSCRIPT OF DOCKET ENTRIES

12-1-60. Complaint filed. Summons issued. Copy of summons and copy of complaint to U. S. Marshal.

12-19-60. Summons returned, served 12-10-60, and filed. $12.00.

1-3-61. Stipulation extending time for defendant to move or plead to 1-25-61, approved and filed. FLK. Notice waived.

1-25-61. Application of defendant for extension of time to plead filed. Mailed 1-25-61.

1-26-61. Order granting application of defendant for extension of time to plead to 2-3-61 approved and filed. FLK Copies 77d to Gibson and Eastman.

2-2-61. Motion of defendant to dismiss filed. Mailed 2-2-61.

2-2-61. Brief in support of defendant's motion to dismiss filed. Mailed 2-2-61.

2-2-61. Affidavit of William C. Henry in support of motion of deft. to dismiss filed. Mailed 2-2-61.

2-16-61. Brief of plaintiff opposing defendant's motion to dismiss petition filed. Mailed 2-16-61.

2-21-61. Order sustaining motion of defendant to dismiss and cause is dismissed without prejudice at plaintiff's costs filed and entered. FLK 17 Copies 77d to Gibson, McDonald and Eastman.

3-23-61. Notice of appeal of plaintiff filed. Certified copy to Eastman.

3-23-61. Appeal bond in the sum of $250.00 with Aetna Casualty & Surety Company, surety, filed.

4-27-61. Record forwarded to U. S. Court of Appeals.

5-3-61. Receipt of record in Court of Appeals.

PETITION

(Filed December 1, 1960.)

Plaintiff says that this action involves federal law; namely, interstate commerce and the Federal Communications Act, and is for more than $10,000.00.

Plaintiff says that at all times herein mentioned he was the operator and licensee of a radio station known as Station WHRW, formerly known as WWBG and WTLG and serving Bowling Green, Ohio, and its vicinity and that said radio station was duly licensed by the Federal Communications Commission to carry on the business of radio broadcasting, and is and at all times mentioned, was engaged in interstate commerce.

Defendant is a public utility corporation, organized under the laws of the State of Ohio and is engaged in the business of furnishing telephone service in northwest Ohio, including the City of Bowling Green, and the County of Wood, and is also engaged in interstate commerce.

First Cause of Action

Plaintiff says that the defendant, over a period of years from February 1955 to September 30, 1959 has charged this plaintiff for wire and telephone service to his radio station according to its schedule of charges or tariff as published by it and on file with the Public Utilities Commission of Ohio, which charges are and were not applicable to service to the radio station for broadcast in interstate commerce.

The defendant, although so engaged in interstate commerce, has not at any time filed a schedule of charges or tariffs with the Federal Communications Commission, either as a principal or as a connecting carrier, as required by the Federal Communications Act.

Plaintiff says that he has therefore been charged unlawfully for such wire service to said radio station in the amount of $5,940.00 for which plaintiff prays judgment against defendant.

Second Cause of Action

Plaintiff for his second cause of action, says that he applied to defendant in June 1954 for telephone and wire service to his radio station in or near Bowling Green, Ohio, which service was necessary in order to enable plaintiff to operate his said radio station. Defendant refused to furnish such service although plaintiff offered and was ready to pay all reasonable and proper charges for such installation and service, and continued to refuse to install such service until ordered to do so by the Public Utilities Commission of Ohio on complaint of plaintiff. After plaintiff applied for said service, the defendant removed its line directly adjacent to plaintiff's station, to support its claim before the Public Utilities Commission of Ohio, that no service was available. The service was not installed

until late in February 1955, thereby delaying plaintiff four months in putting his said radio station into operation, and forcing plaintiff to operate his station for an additional four months without phone or wire service. Plaintiff says that he was damaged by such delay in the amount of $25,000.00.

Wherefore, plaintiff prays judgment against defendant in the amount of $25,000.00 on this, his second cause of action.

Third Cause of Action

Plaintiff for his third cause of action says that he applied in ample time to the defendant for it to install a telephone line from the Wood County Fair Grounds to plaintiff's radio station to enable plaintiff to broadcast events from the Fair, which was held in August 1958. Plaintiff says that he complied with all lawful demands of plaintiff and offered to pay in advance the lawful charges for such line service but defendant failed and refused to furnish the service requested and required by plaintiff.

Plaintiff says that as a result of defendant's refusal to install such service he suffered loss of substantial revenue and loss of good will of his station, and has been damaged thereby in the amount of $15,000.00

Wherefore, plaintiff prays judgment against defendant on this his third cause of action in the amount of $15,000.00.

Fourth Cause of Action

Plaintiff for his fourth cause of action says that on or about the 22nd day of October, 1957, he applied to The Ohio Bell Telephone Company for line service from a new studio that plaintiff was opening in Lima, Ohio, to plaintiff's transmitter site near Bowling Green, Ohio. The transmitter site being located in the area served by the defendant, The Ohio Bell Telephone Company, requested

defendant to furnish line service from its central panel in Bowling Green, to the transmitter site. The line requested from the defendant was wholly within the area served by defendant but the defendant without just cause or reason failed and refused to furnish such service for a period of three months, although plaintiff had offered and was ready to pay all lawful charges for such service. The delay in furnishing such service caused plaintiff to lose a large amount of revenue and loss of good will, and as a result thereof, plaintiff has been damaged in the following particulars:

(a) Enabled a competing company to obtain the business from Lima, part of which plaintiff had already arranged to handle, but was unable to handle because of the inability to obtain the broadcast line. This included a heavy volume of advertising for the Christmas season and for January sales.

(b) This refusal and consequent loss of business in the area caused plaintiff to lose the sale of the radio station at a substantial profit which plaintiff alleges would have occurred had the line been installed promptly.

(c) Plaintiff suffered loss of good will in the Lima area due to defendant's illegal refusal to furnish the services requested at the time such were requested.

Wherefore, plaintiff prays judgment against defendant on this, his fourth cause of action in the amount of $100,000.00.

Fifth Cause of Action

Plaintiff for his fifth cause of action, says that on or about the 1st day of December 1954, he applied to defendant for wire service from his radio station to Napoleon, Ohio, where he had acquired numerous advertisers and

sponsors. Plaintiff offered and was ready to pay all lawful charges for such service. Plaintiff says that defendant without just cause or reason failed and refused to furnish such wire service and never did furnish the same, even though numerous demands were made for the same. Plaintiff says that as a result of such wrongful refusal to furnish service, plaintiff suffered the loss of a large amount of revenue from merchants and advertisers in the area of Napoleon, Ohio. Plaintiff further says that because of plaintiff's inability to get the line service to Napoleon, Ohio, the business which he would have had from the Napoleon area has been lost to him and has been acquired by another radio station.

Plaintiff says that he has been damaged by the refusal and failure of defendant to furnish such service in the amount of $60,000.00

Wherefore, plaintiff prays judgment against defendant on this his fifth cause of action, in the amount of $60,000:00.

Sixth Cause of Action

Plaintiff for his sixth cause of action says that on or about the 10th day of October, 1958, he applied to the Ohio Bell Telephone Company for re-establishment of the line service from his Toledo studio to the transmitter site near Bowling Green, Ohio, to better serve merchants and advertisers in the Toledo area, and offered and was ready to pay all lawful charges for such service. The defendant without just cause or reason refused and failed to re-establish such service from its central control panel at Bowling Green to the transmitter site of the plaintiff, as a result of which plaintiff suffered loss of advertising and other revenue from the Toledo area, and loss of good will of such station, whereby plaintiff has been damaged in the amount of $50,000.00.

Wherefore, plaintiff prays judgment against defendant on this, his sixth cause of action in the amount of $50,000.00.

Seventh Cause of Action

For this his seventh cause of action, plaintiff says that the defendant failed and refused without just cause and still fails and refuses to furnish any telephone service to plaintiff's radio station. Plaintiff states that on or about August 1, 1958, defendant without proper cause severed all telephone connections with the plaintiff's station, which wrongful severing of such service made it impossible for plaintiff's radio station to function as a part of the Conelrad Warning System for Civil Defense and made it impossible for plaintiff's radio station to properly warn the residents of the area of impending dangers from storms or other hazardous conditions. Such discontinuance of telephone service also made it impossible for advertisers to contact plaintiff promptly and caused the consequent loss of advertising revenue and also station good will. As a result of such failure and refusal to render telephone service to the station, plaintiff has been forced to move the station from Bowling Green, Ohio to Lime City, Ohio, thus depriving the people of Bowling Green, Ohio of the advantages of having a local radio station. Plaintiff has incurred great expense in such move which was necessitated solely by defendant's failure and refusal to furnish proper telephone service.

Wherefore, plaintiff prays for judgment against the defendant for this cause of action in the amount of $100,000.00.

Eighth Cause of Action

Plaintiff for his eighth cause of action, incorporates herein and makes a part hereof all of the allegations of the foregoing seven causes of action as fully as if rewritten

herein and says that ever since he constructed his radio station near Bowling Green, Ohio in June 1954, and continuing up to October 1959, the defendant has harassed and inconvenienced this plaintiff in its business in interstate commerce, by long and unnecessary delays in furnishing telephone and wire service and connections to his radio station, and in unjustly and wrongfully refusing to furnish plaintiff with the service required by him, and by annoying plaintiff by repeated calls, threatening to discontinue or cut off service to his station even while a program was in process.

Plaintiff says that although plaintiff was at all times ready and offered to pay defendant the lawful and proper charges for such service, about August 1, 1958, defendant without just cause or reason severed and discontinued all telephone and wire service to plaintiff's said radio station, which put plaintiff's said station out of business and prevented it from functioning as a part of the Conelrad Warning System for Civil Defense and made it impossible for plaintiff's radio station to warn the residents of the area of impending dangers from storms or other hazardous conditions. Such severance of service prevented plaintiff and his customers from communicating with each other and caused the loss of a great amount of revenue from advertisers and from loss of good will.

Plaintiff farther says that said continuing delays, refusal to furnish service requested, and the unlawful and wrongful discontinuance of service and the repeated threats to discontinue or cut off service, made it impossible for plaintiff to operate his radio station, thereby forcing plaintiff to remove his station from the area served by the Northern Ohio Telephone Company to that of the Ohio Belf Telephone Company, where he could obtain proper service from the Ohio Bell Telephone Company. Plaintiff

says that such forced removal of the station was at an expense to plaintiff in excess of $75,000.00, and that the continuing pattern of harassment, annoyance, and refusal to furnish plaintiff with the service requested and required by him over a period of more than four years has damaged plaintiff in the total amount of $100,000.00 for which plaintiff prays judgment against defendant.

Wherefore, plaintiff prays judgment against defendant on all eight of his causes of action in the total amount of $455,940.00 and for his costs herein incurred.

McDonald, Hopkins Hood & Hardy,
Attorneys for Plaintiff.

ORDER DISMISSING CAUSE

(Filed February 21, 1961.)

This day this cause came before the Court on the motion of defendant to dismiss plaintiff's petition for the reason the Court lacks jurisdiction over the subject matter of the claims set forth therein, and upon consideration thereof, good cause therefor appearing, the Court sustains such motion.

It Is Now Ordered that this cause be and it hereby is dismissed without prejudice at plaintiff's costs.

/s/ Frank L. Kloeb,
United States District Judge.

Toledo, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 215.

NORTHERN OHIO TELEPHONE COMPANY,
Petitioner,

vs.

HOWARD R. WARD,
Respondent.

BRIEF IN OPPOSITION
To Petition For Writ of Certiorari.

H. GUY HARDY,
1105 East Ohio Building,
Cleveland, Ohio,
Attorney for Respondent.

McDONALD, HOPKINS, HOOD & HARDY,
JAMES B. DAVIS,
Of Counsel.

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NORTHERN OHIO TELEPHONE COMPANY,

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vs.

HOWARD R. WARD,

Respondent.

BRIEF IN OPPOSITION
To Petition For Writ of Certiorari.

RESTATEMENT OF QUESTION PRESENTED.

The question presented for review is as follows:

Should this Court review the decision of the Court of Appeals holding that there is a question over which the Federal Courts have jurisdiction when a telephone company having all of its facilities located in one state wrongfully fails and refuses to furnish a radio station in that same state telephone lines for broadcast purposes?

RESTATEMENT OF THE CASE.

Respondent accepts Petitioner's statement of the case with two notable exceptions.

Petitioner, Northern Ohio Telephone Company, contends it is involved in interstate commerce solely as a "connecting carrier" through physical connection with the facilities of other telephone companies. However, Petitioner, by furnishing wires for radio broadcasting to the

Respondent, also became involved in interstate commerce as a link in the radio broadcast chain.

Petitioner claims it is and has been deemed a "non-subject" company under the Federal Communications Act of 1934 by the Federal Communications Commission. The basis of this claim is a letter to Petitioner from the FCC the sole purpose of which was to request the voluntary submission of certain data for the FCC yearbook. In this letter Petitioner is incidentally described as a "non-subject company." There is no indication in the record of this case that the FCC was ever made aware of the use of Petitioner's telephone lines in radio broadcasting nor any indication that the FCC found Petitioner was or was not subject to the Communications Act of 1934 in view of such use.

STATEMENT.

It is submitted this case presents no questions that call for the granting of a writ of certiorari. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals, it is not in conflict with decisions of this Court, and no question of federal law is presented which should be settled by this Court.

ARGUMENT.

I. The Court of Appeals Correctly Held That a Federal Question is Presented When a Telephone Company Which Has Its Facilities in One State Wrongfully Refuses to Furnish a Radio Station in That State Telephone Lines For Broadcast Purposes.

Jurisdiction in this case is predicated on the existence of a federal question within the meaning of the Federal Judicial Code, there being no diversity of citizenship.

Title 28, U. S. Code, Section 1337 provides:

> "The District Court shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce * * *."

The Act of Congress upon which the Court of Appeals predicated its decision that the Federal Courts have jurisdiction is the Federal Communications Act of 1934, Title 47, U. S. Code. Petitioner's claim that it is not subject to the damage and enforcement procedure provisions of Sections 206 and 207 of Title 47 (Petitioner's Appendix, page 31) was rejected by the Court of Appeals, the Court stating (Petitioner's Appendix 40):

> "All of the provisions of the Act, as well as the subject matter with which it is concerned, regarding the duties and liabilities of such a carrier as appellee telephone company, would be futile without the remedial provisions setting forth a right to damages for violation thereof and the method of enforcing such right. It would be unreasonable to hold that appellee company is subject to the duties and liabilities set forth in the statute but that it is not subject to the provisions for enforcing the rights which the company may see fit to violate; and we see no reason to conclude that, while appellee company is subject to Sections 201-205, inclusive, of the Act, it is not subject to Sections 206-207, inclusive."

In the enacting of the Communications Act of 1934 Congress legislated that radio broadcasting is a matter of Federal concern exclusively. This Court, lower Federal Courts, and the Federal Communications Commission have uniformly held that radio broadcasting is a matter within the exclusive jurisdiction of the Federal Government.

In *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933), this Court recognized the national scope of radio broadcasting stating:

> "No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities."

In *Fisher's Blend Station, Inc. v. Tax Commission of Washington*, 297 U. S. 650 (1936), a case involving a question as to whether or not the State of Washington had a right to impose a state occupation tax on radio stations, this Court again enunciated the principle that radio broadcasting is matter of Federal concern stating:

> "By its very nature broadcasting transcends state lines and is national in its scope and importance, characteristics which bring it within the purpose and protection and subject it to the control of the Commerce clause * * *."

In *Didrickson v. Federal Communications Commission*, 254 Fed. (2d) 354 (1958), interference with broadcast equipment by a person on strike was deemed to be a matter of Federal concern and Federal jurisdiction was recognized.

The Federal Communications Commission has specifically held that the furnishing of telephone lines to a radio station for broadcast purposes is a matter within the exclusive jurisdiction of the Federal Government.

Strikingly similar to the instant case is the case of *In Re: Capital City Telephone Company*, 3 FCC Reports 189 (1936). In this case, the Capital City Telephone Company, located solely in the State of Missouri, leased telephone lines to a radio station within the State of Missouri. The company admitted that it was subject to the provisions of Sections 201 to 205 of Title 47. The Commission in its decision stated, pages 194 and 195:

> "Congress was cognizant of the fact that wires were used in connection with broadcasting. The intention of Congress to clothe the Federal Communications Commission with jurisdiction over charges and services for wires used in radio communication is evidenced by Section 202(b) which reads: 'Charges or services whenever referred to in this Act, include charges for or services in connection with the use of wires in chain broadcasting or incidental to radio communication of any kind.'
>
> "The fact that the wires used to carry the program from the microphone to the transmitter may be confined to a single state does not mean that the wires are not used in interstate communication. The contract or leasing arrangement may be for a wire service which begins and ends within a single state. *The complete transmission, however, is an interstate communication and is therefore subject to legislation by Congress under the Commerce Clause* * * *. (Emphasis supplied.)
>
> "In view of the express provisions of the Communications Act relative to the use of wires in connection with broadcasting it is indisputable that Congress has legislated on that question. It is a well established rule of constitutional interpretation that when Congress has legislated on a subject which is within its jurisdiction such legislation is exclusive and the power therein granted by Congress is exclusive of all other powers * * *.

"The interstate communication of a broadcasting company begins at the microphone, passes over the wires to the transmitter, and then through the ether, constituting a continuous interstate communication, which, because of its very nature, must be subject to federal regulations * * *.

"*This Commission has exclusive regulatory jurisdiction over wires and wire service furnished by a telephone carrier to a radio broadcasting station even though such wires do not cross state or national boundaries.*" (Emphasis supplied.)

In the *Capital City* case as in this case the telephone company had its facilities all in one state and furnished wires for broadcasting purposes to a radio station located in the same state. The Commission found there that for this purpose—the furnishing of broadcast lines—the telephone company was in Interstate Commerce and subject to Federal Law even though it might be a "connecting carrier" for all other purposes and as such subject only to certain provisions of the Communications Act. It is thus clear that a federal question is presented by the petition and that the Federal District Court has jurisdiction under Section 1337, Title 28, U. S. Code. The decision of the Court of Appeals here is squarely in line with court and administrative precedents. No question on this point is presented that calls for review by this Court.

II. The Court of Appeals Correctly Held That Petitioner Telephone Company Has Duties Under Sections 201-205 of Title 47, Which May Be Enforced Under Sections 206-207.

By express provision (Section 152(b) of Title 47), a connecting carrier is subject to Sections 201-205 of the Act, except where excluded therefrom by specific language. Petitioner does not dispute this. As the Court of

Appeals recognized, Petitioner's duties under Sections 201-205 become meaningless unless a remedy for enforcement is available. Petitioner argues that Sections 206-207 apply only to "common carriers" and not to "connecting carriers." Petitioner ignores the fact that by statutory definition a "connecting carrier" under Section 152(u) is a type of "carrier" or "common carrier" under Section 152 (h).

Petitioner's reasoning ignores not only the express language of the statute, but the overall structure and meaning of the Communications Act.

Part 2 of the Act, Sections 201-222 is entitled "Common Carriers." All of these sections refer to "common carriers" or "carriers" throughout and the language is specific that the words "common carriers" includes "connecting carrier" unless "connecting carrier" is expressly excluded by specific language. There is no such language in Sections 206 and 207; hence, Sections 206 and 207, using only the term "common carrier," should and do apply to Petitioner as the Court of Appeals correctly held.

The applicability of Sections 206 and 207 to the Petitioner is required in order to give effect to the intent of Congress and to give consistent and meaningful interpretation to the Act as a whole. Sections 201-205 prescribe duties incumbent upon Petitioner where it is involved in radio broadcasting, but do not themselves provide any civil sanctions. Sections 202, 203 and 205 contain only criminal penalties for the violation of the duties prescribed therein. Section 201 requiring the furnishing of communication service on reasonable request would be completely without means of enforcement unless Sections 206 or 207 were held to apply, since it contains no sanction civil or criminal. The Court of Appeals rightly found it unreasonable to hold that Congress had committed a vain

act making Petitioner subject to the duties prescribed in Sections 201-205 but not making it subject to the sections enforcing these duties.

If Section 207 does not apply to Petitioner then Respondent radio station could not file a complaint with the Federal Communications Commission against Petitioner for a violation of the provisions of Sections 201-205 because the right to bring a complaint before the FCC is found in Section 207. This strange result could not have been intended by Congress as the Court of Appeals correctly held.

III. The Decision of the Court of Appeals Is Consistent With Administrative Interpretations.

In the *Capital City Telephone Company* case (*supra*, page 5) the FCC recognized that the supplying of broadcast lines to a radio station is a matter for Federal jurisdiction. This facet of the telephone company's operation was deemed exclusively a matter of Federal concern. The existence of this facet of the telephone company's operation did not change the recogniton of the fact that the telephone company was otherwise a "connecting carrier."

The fact that a telephone company is a connecting carrier in no way removes it from the exclusive regulatory jurisdiction of the FCC with regard to those wire services which it furnishes or refuses to furnish to a radio broadcasting station.

None of the cases cited by Petitioner in Part II of its argument in any way contradicts the foregoing proposition. Two of the cases cited by Petitioner in fact expressly support it. In both *Jamestown Telephone Corporation* (Petitioner's Brief, p. 18) and *Northwest Telephone Company* (Petitioner's Brief, p. 19) a telephone company with its facilities physically located all in one state was held

to be a connecting carrier in each case, but in each case the Commission said that it had jurisdiction over wires furnished to the radio station for broadcast purposes.

The case of *In The Matter of Classification of Telephone Companies* (Petitioner's Brief, p. 16) is not in point. It contains no reference whatsoever to radio broadcasting or the furnishing of broadcast lines by telephone company. The issue in this case was not present there.

Petitioner's contention that the decision of the Court of Appeals is in conflict with long standing administrative interpretations is not sound. Petitoner's contention is based on its failure to recognize that it may be regulated by two different agencies for different facets of its operation.

At such time as Petitioner becomes involved in supplying wires for radio broadcast purposes it enters interstate commerce and in regard to this interstate function becomes subject to the exclusive regulatory jurisdiction of the FCC. In regard to the bulk of its telephone communication services which are intrastate, it would remain subject to the PUCO. The holding of the Court of Appeals to this effect was thus entirely consistent with prior FCC administrative rulings in the *Capital City, Jamestown Telephone Corporation* and *Northwest Telephone Company* cases. There was no reversal of administrative interpretation and no question of importance is raised that needs consideration by this Court.

IV. The Doctrine of Primary Jurisdiction Affords No Basis For Certiorari to This Court in This Case.

Petitioner lays great emphasis on the claim that this Court should grant certiorari because of the failure of the Court of Appeals to apply the doctrine of primary jurisdiction. It is submitted that the doctrine of primary jurisdiction is not applicable to this case, but even if it were appli-

cable, it is a doctrine to be applied by the Trial Court on specific issues and not a matter that should be considered by this Court on a petition for certiorari.

Respondent's petition in this case sets forth eight causes of action. Few, if any, of these claims raise issues that should be considered by the FCC. Most are damage claims no different than others regularly handled in Federal Courts. If the doctrine of primary jurisdiction were properly applicable it would be applicable only to certain limited issues.

The doctrine of primary jurisdiction is not a doctrine calling for the dismissal of an action, but merely the suspension of the action in the Trial Court while certain administrative determinations are made. The doctrine is not a denial of jurisdiction of the Federal District Court to hear the case. In fact, it is logically necessary for the Court to have jurisdiction in order to invoke the doctrine. This is clearly set forth by this Court in *United States v. Western PR Company*, 352 U. S. 59, cited by Petitioner (Petitioner's Brief, p. 10):

> "* * * primary jurisdiction on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special confidence of an administrative body; in such a case, the judicial process *is suspended* pending referral of such issues to the administrative body for its views." (Emphasis supplied.)

Even if the doctrine were to be found properly applicable to certain issues in this case, any determination by this Court upon certiorari of the need to invoke the doctrine of primary jurisdiction would be premature. This case has barely begun in the District Court arising on a

motion to dismiss the complaint. There has been no argument on the applicability of the doctrine of primary jurisdiction to any aspects of the various claims made in the petition, since there has been no hearing in the District Court and since this question of primary jurisdiction was never raised by Petitioner in the District Court nor in the Court of Appeals, being raised for the first time in Petitioner's brief here. There has been no consideration of the mechanics of applying the doctrine to this case which could raise problems. The fact that Respondent moved his radio station from the area served by Petitioner as a result of Petitioner's conduct so that we now have an issue solely of past conduct and we are not concerned with future regulation, is a matter of major importance in a Trial Court's exercise of its discretion and judgment as to whether or not to submit any issues in this case to the FCC. Also, this case raises other issues not considered on this appeal.

Certiorari is not the procedural method for dealing directly with the parties in the resolution of issues involved here. Preliminary questions and factual issues involved in this case containing nothing of broad national concern should not be a burden of this Court.

The doctrine of primary jurisdiction is not an issue in this case calling for the granting of a writ of certiorari.

CONCLUSION.

Respondent contends that the decision of the Court of Appeals was clearly correct and that this case raises no issue calling for the granting of a writ of certiorari. Respondent submits that the Court of Appeals correctly ruled that Respondent could bring action under Sections 206-207 of Title 47 to enforce rights under Sections 201-205 violated by Petitioner; that radio broadcasting by Con-

gressional Act and by judicial and administrative interpretation is a matter exclusively within the jurisdiction of the Federal Government. Respondent asserts further that the applicability of the doctrine of primary jurisdiction to the specific issues of this case should not be a burden of this Court on certiorari. Respondent concludes that this case presents no conflict with any decision of this Court or of any other Court of Appeals, or with any District Court or administrative decision, and it presents no issue of law for which this Court should grant certiorari in this case.

Respectfully submitted,

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